

FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Citizenship v Khadgi [2010] FCAFC 145

Citation:	Minister for Immigration and Citizenship v Khadgi [2010] FCAFC 145
Appeal from:	Khadgi v Minister for Immigration [2010] FMCA 381
Parties:	MINISTER FOR IMMIGRATION AND CITIZENSHIP v PADMA KHADGI and MIGRATION REVIEW TRIBUNAL
File number:	NSD 782 of 2010
Judges:	STONE, FOSTER AND NICHOLAS JJ
Date of judgment:	3 December 2010
Catchwords:	ADMINISTRATIVE LAW – whether the Migration Review Tribunal (the Tribunal) fell into jurisdictional error in the present case by failing to have regard to all mandatory considerations prescribed by reg 2.41 of the <i>Migration Regulations 1994</i> (Cth) – whether that failure was demonstrated on the face of the reasons for decision given by the Tribunal – discussion of the meaning of the phrase “<i>have regard to</i>” in s 109(1)(c) of the <i>Migration Act 1958</i> (Cth) – the content of the obligation to have regard to the mandatory criteria specified in reg 2.41 will depend upon the circumstances of each case and will be heavily influenced by the material provided to the relevant decision maker by the visa holder – in the present case, the Tribunal did not fall into jurisdictional error MIGRATION – discussion of the meaning of the phrase “<i>have regard to</i>” in s 109(1)(c) of the <i>Migration Act</i> – discussion of the criteria specified in reg 2.41 of the <i>Migration Regulations</i> as “<i>prescribed circumstances</i>” for the purposes of s 109(1)(c) of the <i>Migration Act</i> WORDS AND PHRASES – “<i>have regard to</i>”
Legislation:	<i>Migration Act 1958</i> (Cth) ss 97, 103, 104, 105, 107, 108 and 109 <i>Migration Regulations 1994</i> (Cth) reg 2.41
Cases cited:	<i>Khadgi v Minister for Immigration and Citizenship</i> [2010] FMCA 381 reversed

Australian Crime Commission v NTD8 (2009) 177 FCR 263 followed
Elias v Commissioner of Taxation (2002) 123 FCR 499
Lafu v Minister for Immigration and Citizenship (2009) 112 ALD 1 followed
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 applied
Minister for Immigration and Multicultural Affairs v Jia Legeng (2001) 205 CLR 507 applied
NAJT v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 147 FCR 51 followed
Singh v Minister for Immigration and Multicultural Affairs (2001) 109 FCR 152 applied
SZDXZ v Minister for Immigration and Citizenship [2008] FCAFC 109 applied
The Queen v Hunt; Ex Parte Sean Investments Pty Ltd (1979) 180 CLR 322 cited
The Queen v Toohey; Ex Parte Meneling Station Pty Ltd (1982) 158 CLR 327 cited
Tickner v Chapman (1995) 57 FCR 451 applied
WAEF v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 75 ALD 630 cited
Zhong v Minister for Immigration and Citizenship (2008) 171 FCR 444 distinguished

Date of hearing:	17 August 2010
Place:	Place_SentenceCase
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	128
Counsel for the Appellant:	Mr S Lloyd SC, Ms LA Clegg
Solicitor for the Appellant:	Sparke Helmore
Counsel for the First Respondent:	Mr P D Reynolds
Solicitor for the First Respondent:	MAS Law
Solicitor for the Second Respondent:	The Second Respondent submitted save as to costs

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 782 of 2010

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

**BETWEEN: MINISTER FOR IMMIGRATION AND CITIZENSHIP
 Appellant**

**AND: PADMA KHADGI
 First Respondent**

**MIGRATION REVIEW TRIBUNAL
Second Respondent**

JUDGES: STONE, FOSTER AND NICHOLAS JJ

DATE OF ORDER: 3 DECEMBER 2010

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders made on 8 June 2010 by Raphael FM in *Khadgi v Minister for Immigration and Citizenship* [2010] FMCA 381 (**the FMC proceeding**) be set aside.
3. The Application made by the first respondent in the FMC proceeding be dismissed.
4. The first respondent pay the costs of the appellant both of the appeal in this Court and of the FMC proceeding.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
The text of entered orders can be located using Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION

NSD 782 OF 2010

BETWEEN: MINISTER FOR IMMIGRATION AND CITIZENSHIP
AND: PADMA KHADGI

JUDGES: STONE, FOSTER AND NICHOLAS JJ
DATE: 3 DECEMBER 2010
PLACE: SYDNEY

REASONS FOR JUDGMENT

1 This is an appeal against a judgment of a Federal Magistrate delivered on 8 June 2010 (*Khadgi v Minister for Immigration and Citizenship* [2010] FMCA 381). The Federal Magistrate ordered that a decision of the Migration Review Tribunal (**the Tribunal**) dated 4 December 2009 and handed down on the same day be removed into the Federal Magistrates Court and quashed. He also ordered that a Writ of Mandamus issue to the Tribunal directing it to reconsider and determine the matter according to law.

2 The Federal Magistrate held that the Tribunal had fallen into jurisdictional error by failing to have regard to a number of criteria to which it was bound to have regard pursuant to s 109(1)(c) of the *Migration Act 1958* (Cth) (**the Act**) and reg 2.41 of the *Migration Regulations 1994* (Cth) (**reg 2.41**).

3 The Tribunal had affirmed a decision of a delegate of the Minister for Immigration and Citizenship (**the delegate**) to cancel the appellant's Subclass 880 (Skilled – Independent Overseas Student) (Residence) (Class DD) visa (**Subclass 880 visa**). The delegate had found that, in 2006, the first respondent (**Ms Khadgi**) had provided a bogus document to the Department of Immigration and Multicultural and Indigenous Affairs (**the Department**) in support of her application for a Subclass 880 visa. The provision of a bogus document to the Department was a breach of s 103 of the Act. The bogus document was a letter dated 22 May 2006 from Trades Recognition Australia (**TRA**), a unit of the Department of Employment and Workplace Relations, to Ms Khadgi's then migration agent in which TRA stated that, for migration purposes, Ms Khadgi had been designated by it as a "*Cook [4513-11]*" (**the first**

TRA approval). The delegate had found that Ms Khadgi had provided a false certificate to TRA from a person who had claimed to be her employer together with other documents which contained untrue statements and had thus procured her designated status as a cook on a false basis. These findings made by the delegate were confirmed by the Tribunal and were not challenged in the appeal before us.

4 Under s 109 of the Act, once the Minister has decided that a holder of a visa has contravened s 103 of the Act and has given to that person a notice under s 107 of the Act, the Minister may cancel the visa held by that person. The Minister may only cancel a visa under s 109(1) of the Act after he has considered the visa holder's response to his s 107 notice and after he has had regard to "*any prescribed circumstances*". The prescribed circumstances for the purposes of s 109(1)(c) of the Act are found in reg 2.41.

5 The Federal Magistrate found that the Tribunal had failed to have regard to any of the mandatory criteria set out in subpars (f) to (k) of reg 2.41 (**the contentious criteria**). It was Ms Khadgi's case in the Federal Magistrates Court and on appeal in this Court that the Tribunal had failed to have regard to *any* [our emphasis] of those criteria.

6 The only issue raised by the appellant (**the Minister**) in this appeal is whether the Federal Magistrate erred by making that finding. For the purposes of the appeal, the parties accept that:

- (a) Ms Khadgi did contravene s 103 of the Act as alleged by the Minister;
- (b) The requisite notice under s 107 of the Act was given by the Minister;
- (c) The Tribunal did consider Ms Khadgi's response to that notice; and
- (d) The Tribunal had regard to the factors specified in subpars (a) to (e) of reg 2.41.

7 The Minister contends that the Federal Magistrate engaged in an impermissible merits review of the Tribunal's decision by misunderstanding and misapplying the relevant principles. In his Notice of Appeal, the Minister provided the following particulars of the only ground of appeal relied upon:

1. The Court erred by finding that the Tribunal failed to consider items (f) – (k) of Reg 2.41 for [sic] the Migration Regulations 1994.

Particulars

The requirement by the Court that the Tribunal “fully engage” and/or deal with the criteria to “the required standard” reveals merits review in circumstances where the mandatory statutory criterion was in each case extracted and separately addressed by a relevant and accurate recitation of facts.

THE RELEVANT LEGISLATIVE PROVISIONS

8 The relevant provisions of the Act are ss 97, 103, 107, 108 and 109. Section 97 provides that, in Subdiv C of Div 3 of Pt 2 of the Act:

97 **Interpretation**

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...

9 Sections 103, 107, 108 and 109 of the Act are in the following terms:

103 **Bogus documents not to be given etc.**

A non-citizen must not give, present or provide to an [officer](#), an [authorised system](#), the Minister, or a [tribunal](#) performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented or provided.

107 **Notice of incorrect applications**

- (1) If the Minister considers that the [holder](#) of a [visa](#) who has been [immigration cleared](#) (whether or not because of that [visa](#)) did not comply with [section 101](#), [102](#), [103](#), [104](#) or [105](#) or with subsection (2) in a response to a notice under this section, the Minister may give the [holder](#) a notice:

- (a) giving particulars of the possible non-compliance; and
- (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the [holder](#) may give the Minister a written response to the notice that:
 - (i) if the [holder](#) disputes that there was non-compliance:
 - (A) shows that there was compliance; and
 - (B) in case the Minister decides under [section 108](#) that, in spite of the statement under subparagraph (A), there was non-compliance—shows cause why the [visa](#) should not be cancelled; or
 - (ii) if the [holder](#) accepts that there was non-compliance:
 - (A) give reasons for the non-compliance; and

- (B) shows cause why the [visa](#) should not be cancelled; and
 - (c) stating that the Minister will consider cancelling the [visa](#):
 - (i) if the [holder](#) gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or
 - (ii) if the [holder](#) gives the Minister a written response within that period—when the response is given; or
 - (iii) otherwise—at the end of that period; and
 - (d) setting out the effect of [sections 108, 109, 111 and 112](#); and
 - (e) informing the [holder](#) that the [holder](#)'s obligations under [section 104](#) or [105](#) are not affected by the notice under this section; and
 - (f) requiring the [holder](#):
 - (i) to tell the Minister the address at which the [holder](#) is living; and
 - (ii) if the [holder](#) changes that address before the Minister notifies the [holder](#) of the Minister's decision on whether there was non-compliance by the [holder](#)—to tell the Minister the changed address.
- (1A) The period to be stated in the notice under subsection (1) must be:
- (a) in respect of the [holder](#) of a [temporary visa](#)—the period [prescribed](#) by the regulations or, if no period is [prescribed](#), a reasonable period; or
 - (b) otherwise—14 days.
- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
- (a) [visas](#) of a stated class; or
 - (b) [visa holders](#) in stated circumstances; or
 - (c) [visa holders](#) in a stated class of people (who may be [visa holders](#) in a particular place); or
 - (d) [visa holders](#) in a stated class of people (who may be [visa holders](#) in a particular place) in stated circumstances.
- (2) If the [visa holder](#) responds to the notice, he or she must do so without making any incorrect statement.

108 Decision about non-compliance

The Minister is to:

- (a) consider any response given by a visa holder in the way required by paragraph 107(1)(b); and
- (b) decide whether there was non-compliance by the visa holder in the way described in the notice.

109 Cancellation of visa if information incorrect

- (1) The Minister, after:
- (a) deciding under [section 108](#) that there was non-compliance by the [holder](#) of a [visa](#); and
 - (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and
 - (c) having regard to any [prescribed](#) circumstances;
- may cancel the [visa](#).
- (2) If the Minister may cancel a [visa](#) under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a [visa](#) must be cancelled.

10 Reg 2.41 lists the prescribed circumstances to which regard must be had by the Minister under s 109(1)(c) of the Act. Reg 2.41 provides:

Reg 2.41 Whether to cancel visa – incorrect information or bogus document (Act, s 109 (1) (c))

For the purposes of paragraph 109(1)(c) of the Act, the following circumstances are prescribed:

- (a) the correct information;
- (b) the content of the genuine [document](#) (if any);
- (c) the likely effect on a decision to grant a visa or [immigration](#) clear the visa holder of the correct information or the genuine [document](#);
- (d) the circumstances in which the non-compliance occurred;
- (e) the present circumstances of the visa holder;
- (f) the subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act;
- (g) any other instances of non-compliance by the visa holder known to the Minister;
- (h) the time that has elapsed since the non-compliance;
- (j) any breaches of the law since the non-compliance and the seriousness of those breaches;
- (k) any contribution made by the holder to the community.

Note Under s. 109 of the Act, the Minister may cancel a visa if there was non-compliance by the holder of a kind set out in Subdivision C of Division 3 of Part 2 of the Act. The Minister is to have regard to the prescribed circumstances in considering whether to cancel the visa.

THE FACTUAL BACKGROUND

11 Ms Khadgi is a citizen of Nepal. She first arrived in Australia on 5 March 2003, having been granted a Class TU (Subclass 572) student visa on 18 February 2003. She was

subsequently granted two further Subclass 572 visas and several bridging visas, the last of which ceased to be valid on 4 April 2007.

12 On 3 May 2006, Ms Khadgi's then migration agent made an application to TRA for a skills assessment of Ms Khadgi for migration purposes. Of the 14 documents provided in support of that application, six related to Ms Khadgi's alleged work experience at Da Franco Incontro Restaurant in Concord.

13 One of the documents which accompanied Ms Khadgi's TRA application was a certified copy of a letter dated 18 April 2006, signed by Franco Graniero (**Mr Graniero**), who described himself in that letter as the Manager and Head Chef of Da Franco Incontro Restaurant. In that letter, Mr Graniero said that Ms Khadgi had completed 900 hours of work experience as an assistant cook at his restaurant. Attached to that letter was a nine page training report also dated 18 April 2006 in which Ms Khadgi set out in considerable detail a description of the work which she had done at that restaurant. Mr Graniero and Ms Khadgi both asserted that Ms Khadgi had worked at Da Franco Incontro Restaurant from 9 April 2005 to 27 March 2006—a period of almost one year.

14 Shortly after 22 May 2006, Ms Khadgi received the first TRA approval.

15 On 21 June 2006, the migration agent then acting for Ms Khadgi submitted the first TRA approval and several other documents to the Department in support of Ms Khadgi's application for a Subclass 880 visa.

16 On 4 April 2007, Ms Khadgi was granted a Subclass 880 visa by the Department.

17 On 6 February 2008, Mr Graniero provided a signed statement to an officer of the Department in which he said that Ms Khadgi had not completed 900 hours of work experience at Da Franco Incontro Restaurant. In that statement, Mr Graniero said that Ms Khadgi had worked at his restaurant for two or three weeks in November or December 2006 and for one week in February 2007, during which periods she worked approximately 2-3 three hour shifts per week. He also said that, while his signature appears at the bottom of each page of the work experience documentation dated 18 April 2006 which was provided by

Ms Khadgi to TRA, it was not possible for Ms Khadgi to have done all of the work which she claimed to have done in the few weeks that she had worked at his restaurant.

18 In a letter dated 17 September 2008 (**the s 107 letter**), the delegate notified Ms Khadgi of the Department's intention to consider cancelling her visa pursuant to s 109 of the Act. In that letter, under the heading "*Particulars of the possible non-compliance*" the delegate stated that she considered that there had been non-compliance with s 103 of the Act because Ms Khadgi had provided the Department with a bogus document (viz the first TRA approval) within the meaning of s 97 of the Act. The delegate then set out the procedure that the Department would adopt in considering the cancellation of Ms Khadgi's visa as follows:

Deciding whether to cancel your visa is a two step process. Firstly, a delegate will decide whether you complied with section 103. Your written response on this aspect will be taken into account.

Secondly, if the delegate decides that you complied with section 103 your visa will not be cancelled. If the delegate decides that you did not comply with section 103, a decision will be made on whether to cancel your visa. Your written response on this matter will also be taken into account.

Regulation 2.41 of the *Migration Regulations 1994* sets out the matters which the delegate must consider:

- the correct information;
- the content of the genuine document (if any);
- the likely effect on a decision to grant a visa or immigration clear the visa holder of the correct information or the genuine document;
- the circumstances in which the non-compliance occurred;
- the present circumstances of the visa holder;
- the subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of the [sic] Division 3 of Part 2 of the Act;
- any other instances of non-compliance by the visa holder known to the Minister;
- the time that has elapsed since the non-compliance;
- any breaches of the law since the non-compliance and the seriousness of those breaches; and
- any contribution made by the holder to the community.

You should address these matters and any other matter you think relevant in your response.

I am obliged to inform you that your obligations under section 104 and 105 continue. A copy of these sections and other relevant sections is attached for your information.

The sections of the Act which were extracted in full and enclosed with the s 107 letter were ss 101, 102, 103, 104, 105, 106, 107, 107A, 108, 109, 110, 111, 112 and 140.

19 In various letters which were subsequently sent to the Department, Ms Khadgi's new migration agent made submissions on Ms Khadgi's behalf in respect of the s 107 letter. The migration agent's first submission to the Department was dated 9 October 2008. In that submission, the agent claimed that there were inconsistencies between the contents of the letter signed by Mr Graniero on 18 April 2006, which Ms Khadgi had submitted to TRA, and Mr Graniero's statement made on 6 February 2008. The agent suggested that Mr Graniero had lied in his statement made on 6 February 2008 because Ms Khadgi had rejected his sexual advances. The agent maintained that the first TRA approval was not a bogus document and that the work experience documentation dated 18 April 2006 which Ms Khadgi had submitted to TRA did not present a false picture of her work experience at Da Franco Incontro Restaurant.

20 In her first submission, the agent addressed some of the matters listed in reg 2.41. In particular, she addressed subpars (f), (g), (j) and (k) of reg 2.41 but did not address subpar (h) (the time that has elapsed since non-compliance).

21 In respect of the contentious criteria, the migration agent said:

the present circumstances of the visa holder;

- The visa applicant obtained her visa on the basis of the required documents she submitted to the Department. The 880 visa was granted on 4 April 2007.

the subsequent behaviour of the visa holder concerning her obligations under Subdivision C of Division 3 of Part 2 of the Act;

- The visa applicant responded promptly to the Notice of Intention to Cancel the visa. She has sought to explain and justify the false information provided to DIAC by Mr Franco Graniero.
- The visa applicant believes that the reason for Mr Graniero now making conflicting statements in relation to her work experience and residential histories approximately 1 year and 10 months after the initial statement was made on 18 April 2006 is due to her rejection towards his sexual advances. Mr Graniero had allegedly made several attempts to pursue the visa applicant and was rejected by her on all those occasions. The visa applicant did not make a formal complaint until September 2008 due to her fear for her friends as they all lived in the apartment leased out by Mr Graniero. In Dr Lennings' report, he stated that:

'14. I note that Ms. Khadgi has now made a formal complaint in regard to sexual harassment on this matter, but only last week. She said that she did not know that she had any right to complain until recently. As Mr. Graniero was also the landlord to her friends they were not keen for her to make problems for them. It is only now that she is moving that she can make the complaint.'

any other instances of non-compliance by the visa holder known to the Minister;

- There is no evidence of other instances of non-compliance by the visa applicant before DIAC.

any breaches of the law since the alleged non-compliance and the seriousness of those breaches;

- There is no information under question before DIAC of other breaches of the law.

any contribution made by the holder to the community;

- The visa applicant intends to make a significant contribution in Australia through her future employment in the hospitality industry. She has studied in hospitality courses since her first arrival in Australia in March 2003 and is capable of gaining employment in the hospitality field.

‘9. She tells me she enjoys living in Australia as she can see that she can make her career...’

‘12. Although Ms. Khadgi would like to find more work in the restaurant area she is unable to go back to TAFE in order to pursue further study due to lack of money. However, she informs me that she does have the basic qualification necessary to obtain employment in the hospitality area. A difficulty for her of course is that given the current argument between her and her former employer, she is not likely to rely on him for a reference, further complicating her employment opportunities.’

22 The numbered paragraphs in italics quoted by the migration agent in her submission dated 9 October 2008 were taken from the report of Dr Lennings, a clinical psychologist retained by Ms Khadgi to assist her in dealing with the s 107 letter.

23 On 22 October 2008, the delegate telephoned Mr Graniero and requested further information about Ms Khadgi’s alleged work experience at Da Franco Incontro Restaurant. Mr Graniero explained to the delegate that the letter and report of 18 April 2006 which had been provided by Ms Khadgi to TRA had both been written by Ms Khadgi and had been signed by him without his having read either of them. Subsequently, on 7 November 2008, Mr Graniero provided a further signed statement to the Department in which he said that the contents of the 18 April 2006 documents were inaccurate. By its letter dated 15 December 2008, the Department invited Ms Khadgi to comment on Mr Graniero’s statement of 7 November 2008.

24 On 5 January 2009, Ms Khadgi’s migration agent provided a further submission to the Department. In this submission, the agent addressed the claims which Mr Graniero had made in his statement dated 7 November 2008. In this submission, Ms Khadgi’s migration agent

again challenged Mr Graniero's version of events, drawing the Department's attention to inconsistencies between the statements made by Mr Graniero in his letter dated 18 April 2006 and those contained in his second and third statements. Ms Khadgi's migration agent suggested that these inconsistencies demonstrated that Mr Graniero was not telling the truth in his second and third statements.

THE DELEGATE'S DECISION

25 On 19 February 2009, the delegate notified Ms Khadgi's migration agent that she had decided to exercise her discretion to cancel Ms Khadgi's visa, such cancellation to take effect on the same day (19 February 2009).

26 The delegate rejected Ms Khadgi's version of events and decided that Ms Khadgi had breached s 103 of the Act. The delegate did not believe everything that Mr Graniero had said either. She said:

Mr Graniero initially claimed that he could not recall seeing the work experience documents signed by him and submitted by Ms Khadgi to TRA. However, on further investigation by the Department, Mr Graniero admitted to having signed the documents but claimed that he had not read their contents and had trusted Ms Khadgi who had written the letter and accompanying pages.

I do not however believe this version of events and accept that Mr Graniero knew full well the contents of the work experience letter and accompanying pages, and had signed them in order to assist Ms Khadgi in her application to TRA. Furthermore, Ms Khadgi had copies of legal documents in reference to Mr Graniero's restaurant business, which I believe she could only have obtained with the assistance of Mr Graniero. Moreover, I believe that Mr Graniero did not fully understand the consequences of his actions until he was approached by the Department, where he readily admitted to the truth of Ms Khadgi's work experience. I accept this statement of events given that Mr Graniero readily signed a legal Statement to that effect.

27 In the delegate's decision record, when discussing s 109 of the Act, under the heading "*Assessment*", the delegate addressed each of the prescribed circumstances set out in reg 2.41, as well as other relevant factors. The delegate found that Ms Khadgi had knowingly submitted false documents to TRA (viz the 18 April 2006 documents) and had thereby procured the first TRA approval on a dishonest basis. The delegate therefore held that the first TRA approval was a bogus document as defined in s 97 of the Act. The delegate also found that Ms Khadgi would not have met the relevant criteria for a Subclass 880 visa if she had not procured the first TRA approval and had not submitted that approval to the Department.

28

In relation to the contentious criteria, the delegate said the following:

- (f) *the subsequent behaviour of the visa holder concerning their obligations under Subdivision C of Division 3 of Part 2 of the Act [reg. 2.41(f)]*

Ms O'Donoghue, on behalf of Ms Khadgi, has responded to both the Notice of Intention to Consider Cancellation under s109, sent on 17 September 2008 and to the additional information forwarded on 7 November 2008.

- (g) *any other instances of non-compliance by the visa holder known to the Minister [reg. 2.41(g)]*

There is no other instance of non-compliance by Ms Khadgi.

- (h) *the time that has elapsed since the non-compliance [reg. 2.41(h)]*

The non-compliance occurred when Ms Khadgi presented a bogus document in support of her skilled – independent overseas student visa application lodged on 6 June 2006. That is, approximately two and half years have elapsed since Ms Khadgi's non-compliance.

- (i) *any breaches of the law since the non-compliance and the seriousness of those breaches [reg. 2.41(i)]*

There is no information before the Department that would indicate further breaches of the *Migration Act 1958* by Ms Khadgi since the non-compliance.

- (k) *any contribution made by the holder to the community [reg. 2.41(k)]*

Ms O'Donoghue does not discuss any specific contribution made by Ms Khadgi to the Australia [sic] community, however as mentioned above, Ms Khadgi hopes to obtain employment in the hospitality industry and pursue further studies.

29

Under the heading “*Decision*”, after noting the sections of the Act and aspects of Ms Khadgi's submissions which she considered in coming to her decision, the delegate concluded as follows:

Having decided under section 108 of the Act that there was non-compliance by Ms Khadgi and after considering Ms Khadgi's response, through her representative, to the Notice and after having considered the prescribed circumstances set out in regulation 2.41, I was satisfied that I may cancel Ms Khadgi's visa.

Matters prescribed in Regulation 2.41 that provide reasons for not cancelling the visa are those prescribed in (e), (f) (g) (h) and (j) ie Ms Khadgi's future plans, the time that has elapsed since the non-compliance and the absence of any adverse subsequent behaviour and breaches of the *Migration Act 1958*. However, I consider these reasons are not sufficient to outweigh the other prescribed matters in (a), (c) (d) and (k). I give substantial weight to the nature of the correct information, the likely refusal of the application had the correct information been disclosed and the circumstances in which the non-compliance occurred.

I consider that the reasons for cancelling Ms Khadgi's visa, in relation to the prescribed circumstances in Regulation 2.41, outweigh the reasons for not cancelling the visa.

For the above reasons, I exercise my discretion under section 109 of the Act to cancel the visa.

THE PROCEEDINGS BEFORE THE TRIBUNAL

The Interlocutory Stages and the Hearing

30 On 9 March 2009, Ms Khadgi, through a newly employed migration agent, applied to the Tribunal for a review of the delegate's decision.

31 The Tribunal wrote to Ms Khadgi on 1 April 2009. In that letter, the Tribunal set out information that it considered would be the reason or part of the reason for affirming the decision under review. After providing particulars of that information, the Tribunal invited Ms Khadgi to comment on or respond to that information and, if she wished, to provide information as to why she believed that grounds for cancellation did not exist. She was also asked to provide wages records, copy Income Tax Returns, Income Tax Assessments and Group Certificates for the 2005, 2006 and 2007 Income Tax Years.

32 In its letter, the Tribunal then said:

If the Tribunal finds that you breached s.103, the Tribunal must consider whether the cancellation of your Subclass 880 visa is the correct or preferable decision. In considering whether the decision to cancel your visa is the correct or preferable decision, the Tribunal must consider all your circumstances and have regard to the prescribed circumstances in r. 2.41 of the Regulations. The Tribunal invites you to provide information with respect to these matters.

The Tribunal then set out reg 2.41 in full.

33 The Tribunal required Ms Khadgi to provide her response (if any) by 29 April 2009.

34 On 28 April 2009, Ms Khadgi provided two statutory declarations to the Tribunal. She did not provide any of the taxation documents which she had been invited to provide. One of the statutory declarations responded directly to the particulars specified in the Tribunal's letter of 1 April 2009. The other statutory declaration explained why, in Ms Khadgi's opinion, grounds for cancellation did not exist. It is sufficient for present purposes to note that, in both of her statutory declarations, Ms Khadgi focused on providing a detailed chronological account of her dealings with Mr Graniero and on responding to the claims made in Mr Graniero's statements in order to cast doubt on Mr Graniero's credibility. She maintained her position that the work experience documentation dated 18 April 2006

contained a true account of her work at Da Franco Incontro Restaurant. At par 32 of her first statutory declaration, Ms Khadgi also said:

... I am a law abiding person and would not have the guts to do something so fraudulent in official papers and submit it to the Australian government. I continue to work in my chosen field of work. I am still in the Hospitality industry. – working as a cook for Punjab Curry House, situated at 277 Church Street, Parramatta, NSW.

35 The above statement was the only part of either statutory declaration which could conceivably be thought to have addressed any of the contentious criteria.

36 In a letter dated 13 May 2009, the Tribunal invited Ms Khadgi to appear before it to give evidence and to present arguments relating to the issues arising in her case. In that letter, the Tribunal told Ms Khadgi that the hearing of her application for review was scheduled to occur on 7 July 2009 and enclosed a form entitled “*Response to Hearing Invitation*”. This form enabled Ms Khadgi to confirm her attendance at the hearing and to make requests of the Tribunal or attach additional information for the Tribunal to consider. A completed Response to Hearing Invitation form was received by the Tribunal from Ms Khadgi’s migration agent on 18 May 2009. On the same day, in response to a telephone enquiry made by her migration agent, Ms Khadgi’s agent was told by an officer of the Tribunal that the Tribunal would consider any further information which Ms Khadgi or her agent may wish to provide as long as it was provided before the hearing. In fact, no further information or documentation was provided to the Tribunal before the hearing.

37 The hearing of Ms Khadgi’s application for review took place on 7 July 2009. During that hearing, Ms Khadgi handed up a copy of a letter from TRA to her dated 10 February 2009 (**the second TRA approval**). In that letter, TRA said that Ms Khadgi’s second application for skills assessment had been successful and that Ms Khadgi had satisfied the 900 hour work experience requirement. Her occupation for migration purposes was assessed as “*Cook 4513-11*” (the same designation as had previously been determined by TRA in the first TRA approval).

The Decision of the Tribunal

38 On 4 December 2009, the Tribunal notified Ms Khadgi’s migration agent of its decision to affirm the delegate’s decision and to dismiss her application for review.

39 At [21]–[63] of its reasons, the Tribunal considered Ms Khadgi's claims in considerable detail. It did so by reference to Ms Khadgi's TRA application, the first TRA approval, the statements made by Mr Graniero, Ms Khadgi's submissions responding to the s 107 letter and the supporting documentation provided by Ms Khadgi, the Tribunal's letter of 1 April 2009 and the content of the two statutory declarations provided by Ms Khadgi on 28 April 2009.

40 At [64]–[98] of the Tribunal's reasons, the Tribunal summarised the course of the hearing before the Tribunal, the questions put to Ms Khadgi at the hearing, the answers given by Ms Khadgi to those questions and the information provided by Ms Khadgi's migration agent at the hearing, as well as a subsequent communication between the Tribunal and Ms Khadgi's migration agent on 13 August 2009.

41 At [64]–[66] of its reasons, the Tribunal said:

- 64. The applicant gave evidence that she is living in Strathfield and is working in retail. She stated that she lost her job in a restaurant because there was new management.
- 65. At the hearing the applicant provided an assessment by TRA of the Department of Education, Employment and Workplace Relations (DEEWR) dated 10 February 2009 stating that the applicant's application for assessment of her skills as a Cook for the purposes of migration had been successful.
- 66. The representative stated that the applicant had made another application to TRA to have her skills assessed. This did not include the work experience from DFIR. The representative stated that the recent assessment by TRA was on 10 February 2009. The Tribunal asked about the statement in the letter that the evidence provided has satisfied the 900 hours. The applicant stated that she had worked in a restaurant belonging to a relative in Nepal.

42 At [80] of its reasons, the Tribunal said:

- 80. The applicant stated that she does not have any evidence of tax returns because the work that she was doing was voluntary. The applicant stated that she has a bank account in Australia. There was no money that was paid to her from the restaurant and she worked there voluntarily. The applicant does not have a Group Certificate for the year ending 30 June 2005. The applicant stated that she lost her income tax assessments for the years 2005, 2006 and 2007.

43 The Tribunal then went on to say, at [87]–[89] of its reasons:

- 87. The Tribunal informed the applicant that one of the matters that the Tribunal had to determine was whether the letter from TRA was a bogus document

and the Tribunal informed the applicant that in the *Migration Act*, a bogus document is defined. The Tribunal informed the applicant of the meaning of a 'bogus document'. The Tribunal informed the applicant that it had to determine whether the assessment by TRA on 22 May 2006 was provided because of a false document give [sic] to TRA. The applicant stated that Mr Graniero signed the document. The Tribunal informed the applicant that it appears that Mr Graniero has admitted that it is his signature but he is saying that the document is false. He is also saying that the information is inaccurate in it and the applicant did not work for those hours and did not do those tasks that are listed. The applicant stated that she does not know why he is saying that. The Tribunal informed the applicant that if it finds that it is a bogus document and the applicant has not complied with s.103 of the *Migration Act*, then the Tribunal has to consider the prescribed circumstances in Regulation 2.41.

88. The Tribunal informed the applicant that it is aware that she disputes that the letter is bogus and claims that she did work at the restaurant. The applicant agreed. The Tribunal asked the applicant her present circumstances. The applicant stated that she was working in an Indian restaurant for three to four months but the restaurant is under new management and she lost her job. She has found a job in retail in a chemist shop. She has the right to work on her Bridging visa. The applicant stated that she has complied with the law (other than the matter relating to the bogus document which the applicant disputes).
89. The Tribunal informed the applicant that it had received submissions and her Statutory Declarations but also asked the applicant if there was anything else she wanted to add in relation to the matters under Regulation 2.41. The applicant referred to the recent TRA letter. The Tribunal asked the applicant if she had made any contribution to the community. She stated that she is not a member of any clubs or of a Nepalese association.

44 The Tribunal referred to the second TRA approval at [66] and at [89] of its reasons. At [66], the Tribunal recorded what it was told at the hearing by Ms Khadgi's migration agent. At [89], the Tribunal recorded what it was told at the hearing by Ms Khadgi. The Tribunal did not make any finding as to the truth of the statements which it recorded at [66] and [89] of its reasons. The Tribunal appeared to accept the authenticity of the second TRA approval (see, in particular, [137] and [143] of its reasons). It also seems to have proceeded upon the basis that the second TRA approval had been obtained without any reliance being placed on Ms Khadgi's work at Da Franco Incontro Restaurant or the work experience documentation dated 18 April 2006. Ms Khadgi said that the 900 hours requirement had been satisfied by her work in a friend's restaurant in Nepal.

45 At [99]–[128] of its reasons, under the heading "*Findings and Reasons*" following the subheading "*Validity of s.107 Notice*", the Tribunal considered the validity of the s 107 letter and the issue of whether the first TRA approval was a bogus document. The Tribunal held that the s 107 letter complied with s 107 of the Act and was a valid notice given under

that section. The Tribunal rejected Ms Khadgi's version of events, concluding that Ms Khadgi had provided a bogus document as part of her Subclass 880 visa application and had consequently contravened s 103 of the Act. Then, under the subheading "*Consideration of discretion*", the Tribunal turned its attention to s 109 of the Act and to each of the prescribed circumstances set out in reg 2.41.

46

At [129]–[150] of its reasons, the Tribunal said:

Consideration of discretion

129. As the Tribunal has decided that there was non-compliance in the way described in the notice given to the applicant under s.107 of the Act, it is necessary to consider whether the visa should be cancelled pursuant to s.109(1).
130. Matters raised by the applicant in response to the s.107 Notice and before the Tribunal are discussed below, in the context of the prescribed circumstances and other considerations.
131. As noted earlier, the prescribed circumstances for the purposes of s.109(1)(c) of the Act are set out in r.2.41 of the Regulations. The Tribunal's consideration of these matters is as follows.

The correct information

132. The Tribunal has found that the applicant did not work for 900 hours for the Da Franco Incontro Restaurant. Therefore the correct information is that the applicant did not work for the 900 hours and she provided incorrect information and false documents to DEWR in her migration skills application.
133. The Tribunal finds that providing such incorrect information is a significant and serious matter. The Tribunal finds that the applicant may well not have been granted the visa without the letter from DEWR and the Tribunal finds that the applicant may well not have received acceptance of her skills as a Cook for migration purposes. The Department followed up the provision by the applicant of the letter dated 18 April 2006 from Franco Graniero and a five page document outlining 900 hours of work experience in the restaurant, by contacting Mr Graniero who admitted that the documents were false. The Tribunal finds that a successful application to DEWR was highly relevant to the application and the obtaining of the assessment by DEWR was one of the bases for the grant of the Subclass 880 visa.

The content of the genuine document (if any)

134. The Tribunal has found that the applicant did not work for 900 hours at the Da Franco Incontro Restaurant. The Tribunal finds that if the applicant provided a genuine document to DEWR she would most likely not have received acceptance of her migration skills.

The likely effect on a decision to grant a visa or immigration clear the visa holder of the correct information or the genuine document

135. The Tribunal considers that the likely effect of the correct information would have resulted in a finding by the delegate that the applicant did not meet the criteria for a Subclass 880 visa. The Tribunal finds that it is likely that the

applicant would not have been granted a Subclass 880 visa if the correct information had been provided. The likely effect of a genuine document and the correct information is that the applicant would not have obtained a letter from DEWR accepting her migration skills application as a Cook.

The circumstances in which the non-compliance occurred

136. The applicant has disputed that a bogus document was given as part of the application. The Tribunal has found that the applicant provided a bogus document as part of her visa application. The Tribunal finds that the giving of false information in the application was serious and significant.

The present circumstances of the visa holder

137. The applicant gave evidence at the hearing that she is working at a chemist shop. Her previous representative stated that the applicant is looking at pursuing further study which would be impossible if she returns to Nepal. The applicant has adapted to the Australian lifestyle and would have to make significant adjustments if she had to return to Nepal. She would also have to leave friends and work colleagues. The applicant claimed that she intends to make a significant contribution in Australia through her future employment in the hospitality industry. She has studied hospitality courses since arriving in Australia in March 2003 and is capable of gaining employment in the hospitality field. The applicant claimed that her previous studies and work experience would go to waste if she has to return to Nepal where the prospects of finding a job in the hospitality industry are unlikely. At the hearing the applicant provided an assessment dated 10 February 2009 by TRA stating that the applicant's application for assessment of her skills as a Cook for the purposes of migration had been successful.
138. If the applicant's visa remains cancelled, she will have to leave Australia. The Tribunal accepts that this will cause the applicant and her family some hardship and cost. However, she has not satisfied the requirements for a Subclass 880 visa and the Tribunal finds that she must have known this and cannot be surprised that she would have to depart Australia at the end of her authorised stay.

The subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act

139. There is no information before the Tribunal about the applicant's subsequent behaviour.

Any other instances of non-compliance by the visa holder known to the Minister

140. There is no evidence of other instances of non-compliance by the applicant or of breaches of the law.

The time that has elapsed since the non-compliance

141. The applicant applied to TRA for her skills to be assessed for migration on 1 May 2006 and applied for a Subclass 880 visa on 22 June 2006.

Any breaches of the law since the non-compliance and the seriousness of those breaches

142. The Tribunal is not aware of any further breaches of the law.

Any contribution made by the holder to the community

143. The applicant stated that she is not a member of any clubs or of a Nepalese association. She is working in retail at a chemist shop. The applicant provided a letter from TRA dated 10 February 2009 stating that her

application for assessment of her skills as a Cook for the purposes of migration had been successful.

144. The Department's PAM3 'Visa Cancellation – General cancellation powers' at [15.3] lists certain other matters that, where relevant, should be taken into account as a matter of government policy when considering whether to exercise the discretion to cancel a visa under s.109 of the Act.
145. The Tribunal is not satisfied that the visa would have been granted if a bogus document had not been given.
146. The applicant has stated that her visa should not be cancelled as she has told the truth. The Tribunal has found that the applicant has breached s.103 of the Act and she would not have been granted the Subclass 880 visa if the bogus document had not been given at time of application.
147. The applicant's previous representative stated that the applicant fears being forced into an arranged marriage if she returns to Nepal. However, there is no specific evidence of this and it appears to be an unsubstantiated concern that is not based on any evidence.
148. There is no evidence before the Tribunal that relevant international agreements would or may be breached as a result of the visa cancellation. There is no evidence that the cancellation would lead to removal of the applicant in breach of Australia's non-refoulement obligations.

CONCLUSIONS

149. The Tribunal has decided that there was non-compliance by the applicant in the way described in the notice given under s.107 of the Act. Further, having regard to all the circumstances, the Tribunal is satisfied that the applicant's Subclass 880 visa should be cancelled.

DECISION

150. The Tribunal affirms the decision to cancel the applicant's Subclass 880 (Skilled – Independent Overseas Student) visa.

THE DECISION OF THE FEDERAL MAGISTRATE

47 Ms Khadgi sought judicial review of the Tribunal's decision on 24 December 2009. In her application for judicial review, Ms Khadgi raised the following grounds:

Grounds of application

1. The Tribunal committed jurisdictional error by failing to have regard to a relevant consideration.

Particulars

The Tribunal failed to have regard to the considerations set out at reg. 2.41(f)–(k) of the Migration Regulations 1994 (Cth), which are mandatory considerations by virtue of section 109(1)(c) of the Migration Act 1958 (Cth) ("Act").

2. The Tribunal's decision is affected by jurisdictional error in that the statutory preconditions to the issuing of a notice under section 107 and the exercise of the power to cancel a visa under section 109 had not been satisfied.

Particulars

....

48 Only the first ground was pressed by Ms Khadgi before the Federal Magistrate.

49 After giving an overview of the factual background of the case and the approach of the Tribunal at [1]–[10] of his reasons, the Federal Magistrate reviewed the submissions of the parties as to the meaning of the Tribunal’s obligation to “*consider*” the prescribed circumstances, as required by s 109 of the Act.

50 Those submissions were aptly summarised at [15] of the Federal Magistrate’s reasons as follows:

15. The applicant argues the failure to consider a mandatory matter constitutes a failure to take into account a relevant consideration that constitutes jurisdictional error; *Minister for Aboriginal Affairs v Peko Wallsend Limited* (1985) 162 CLR 24 at [39] per Mason J. The respondent argues that:

“What is required by the Tribunal is an active intellectual consideration where the consideration is a central element in the consideration of a decision maker or something of sufficient weight or importance: *Peko Wallsend Ibid* at [39–40], *Telstra Corporation Limited v Australian Competition and Consumer Commission* (2008) 107 ALD 474; [2008] FCA 1758 at [103–112] approved and applied in *Telstra Corporation Limited v Australian Competition Tribunal* [2009] FCAFC 23 at [267] per Jacobson, Lander and Foster JJ. On the facts of this case it is clear that none of the items were items in (f) to (k) of Regulation 2.41 were ultimately central to the exercise of the Tribunal’s discretion. On the facts, nor would one expect them to be. Section 109 requires their consideration, but the exercise of the Tribunal’s discretion evidently did not turn upon them.”

51 At [12]–[14] of his reasons, the Federal Magistrate noted that Ms Khadgi’s interpretation of the meaning of “*consider*” was informed by the interpretation of the Full Court in *Tickner v Chapman* (1995) 57 FCR 451 at 462 (per Black CJ) where the expression was interpreted as requiring the decision-maker to undertake an active intellectual process directed at the representation or submission—an interpretation which was referred to with approval by Madgwick J in *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 147 FCR 51 at [212] (pp 92–93). In *NAJT*, his Honour held that a decision maker cannot be said to have had regard to all of the information to hand when he or she is under a statutory obligation to do so, without at least really and genuinely giving consideration to all of that information.

52 At [16]–[17] of his reasons, the Federal Magistrate discussed the decision of Lander J in *Zhong v Minister for Immigration and Citizenship* (2008) 171 FCR 444, in which Counsel for Ms Khadgi placed much store. The Federal Magistrate cited [83], [85] and [86] of the reasons of Lander J in that case. In those paragraphs of his reasons, Lander J observed that the relevant decision-maker must specifically consider the matters listed in reg 2.41, in the sense that the decision-maker is obliged to specifically enquire into those circumstances. The Federal Magistrate went on to say, however, that, while he was prepared to accept that the reasoning of Lander J in *Zhong* was directly in point, he was nonetheless required to find whether or not “*this Tribunal in this case*” had failed to give consideration to the contentious criteria.

53 At [18]–[25] of his reasons, the Federal Magistrate discussed the Tribunal’s obligation to consider all of the prescribed circumstances. At [18]–[19], his Honour said:

18. I am unable to say that I am assisted by *Zhong* in coming to what is essentially a factual conclusion as to what the Tribunal may have done in the instant case...
19. The MRT decision in *Zhong* was not before me so I am unable to compare the quantity or quality of the purported consideration in that case with what occurred in the instant case. Suffice to say that it would appear that there was reference to factors of community contribution by the applicant to the Tribunal but it was not sufficient to satisfy what Lander J saw as the need to “specifically enquire”. **I take from this that it is not enough to show that there was some discussion to conclude that a matter was considered. The court must be able to assess the quality of that discussion to decide whether it amounts to a specific enquiry and thus consideration in the *Chapman v Tickner* sense. Thus each of the items (g) to (k) need to be considered** [our emphasis]. In considering them I shall take into account the oft quoted observations of the Full Court of the Federal Court in Applicant *WAAE v Minister for Immigration* (2003) 75 ALD 630 at [47]:

[47] The inference that the tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected. Where, however, there is an issue raised by the evidence advanced on behalf of an applicant and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the tribunal’s review of the delegate’s decision, a failure to deal with it in the published reasons may raise a strong inference that it has been overlooked.

And the decision of the Full Court Lindgren, Rares and Foster JJ in *Lafu v Minister for Immigration* [2009] FCAFC 140. In that case it was accepted

that the Tribunal was required to take into account the question of deterrence in a s.501 visa cancellation issue when that matter was required to be taken into account by Direction 21 of the Minister's Directions. The first instance Judge found deterrence had been taken into account and made reference to four paragraphs in the AAT decision about it. These four paragraphs were revealed to be identical to a similar four paragraphs in another AAT decision by the same Tribunal member and her Honour accepted that the AAT's observations read in isolation were capable of giving rise to a suspicion of abstract recitation of principle irrespective of the facts in the individual case. Her Honour also applied the views expressed by the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shang Liang* (1996) 185 CLR 259 at [272] and understood the need for an engagement by the AAT in "an act of [sic] intellectual process" per *Tickner v Chapman* at [462]. The Full Court opined:

[49] When the allowances called for by this passage [*Wu Shang Liang*] are made, we remain of the view that the AAT's reasons for decision fall on the wrong side of the line: **they do not show an active intellectual engagement with the question how the factor or consideration of general deterrence was taken into account, and therefore whether it was taken into account at all, in the exercise of a discretion to cancel. Mr Lafu would be left to guess what role, if any, the issue of general deterrence had played** [our emphasis]. Yet it will be recalled (see [32] above) that Mr Lafu had expressly submitted that "[g]iven the lack of publicity about the matter, and the lack of any gang involvement, cancelling the applicant's visa would have no deterrent value".

[50] We do not think that the structure of the AAT's reasons for decision is to be ignored. It was at [124]–[127] that the AAT deliberately turned its attention to the requirement that it consider a question of general deterrence, yet we find in those paragraphs no engagement with the question how the AAT considered the way, if any, that the issue of general deterrence related to the facts of Mr Lafu's case.

...

[53] We are not persuaded that the passage from WAEF set out at [45] above signifies that the AAT was relieved from giving reasons as to the actual relevance general deterrence had to its decision to affirm the cancellation of Mr Lafu's visa. In the present case the AAT **did** expressly refer to the issue of general deterrence in the statement of its reasons. The problem is that [124]–[127] where the AAT did so, turn out, upon analysis, not to expose a consideration of the question of general deterrence as it relates to the facts of the present case at all.

[54] Notwithstanding her Honour's careful analysis, our own careful analysis of the AAT's reasons convinces us that so far as those reasons reveal, the AAT did not reach a conclusion in relation to whether and to what extent general deterrence was relevant to the circumstances of Mr Lafu's case. Apart from reciting the requirement that that factor be taken into account, the AAT's reasons do not indicate whether the AAT was influenced, and if so by what process of reasoning, by the factor of general deterrence, in deciding that Mr Lafu's visa was to be cancelled. We conclude that the AAT

did not give real consideration to the factor of general deterrence as it related to the individual circumstances of Mr Lafu's case.

What I take from *Lafu* is that where there is a prima facie indication that the Tribunal has not fully engaged with a required criteria the court will examine the statement of reasons with some care so that it can decide whether the manner in which the Tribunal dealt with the particular criteria came up to the required standard [our emphasis].

54 At [20]–[25] of his reasons, the Federal Magistrate addressed the Tribunal's reasoning in respect of each of the contentious criteria. The Federal Magistrate concluded that the Tribunal had failed to engage sufficiently with any of the contentious criteria.

55 At [20]–[24] of his reasons, the Federal Magistrate said:

20. ***The Subsequent Behaviour of the Visa Holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act***

[139] There is no information before the Tribunal about the applicant's subsequent behaviour. [CB 266]

When this topic was considered by the delegate [CB 163] she noted:

"Ms O'Donogue on behalf of Ms Khadgi has responded to both the notice of intention to consider cancellation under s.109 sent on 17 September 2008 and to the additional information forwarded on 7 November 2008."

My reading of this criteria is that it has much in common with the consideration given by sentencing Judges to the manner in which a convicted person acted following charges being laid. It is clear that Ms Khadgi, through a migration agent, co-operated with the department and she went further. Although denying the truth of Mr Graniero's statements and maintaining her position that she had completed 900 hours of work experience, she sought and obtained a new TRA in respect of which the work experience has not been impugned. **The Tribunal's responsibility is to engage with the criteria, not to get its decision upon the criteria right. If it had indicated in its reasons for decision that it did not consider the consideration given by the delegate to this criteria was responsive or that the applicant's new TRA should be considered under this criteria then the court would be able to identify an appropriate level of engagement [our emphasis].** The one line sentence at [139] compares unfavourably with the more detailed consideration given to other criteria between [132] and [138]. The Tribunal did invite the applicant to comment upon this and all the other criteria in its letter of 1 April 2009 [49] [CB 247]. Whilst the matter was not specifically addressed in Ms Khadgi's response it could be said this was understandable as she was attempting to establish the bona fides of her application. Her agent did send the new TRA to the Tribunal at a later date. There is nothing in the Tribunal's record that indicates that it took the applicant through these criteria at the interview and recorded her response. References to the criteria are found in the findings and reasons section and not in the "the Tribunal hearing" section where one would expect to see a report of such questions and answers. There is a reference at [87] [CB 255] where the Tribunal says:

“The Tribunal informed the applicant that if it finds that it is a bogus document and the applicant has not complied with s.103 of the Migration Act then the Tribunal has to consider the prescribed circumstances in Regulation 2.41.”

And at [89] [CB 255]:

“The Tribunal informed the applicant that it had received submissions and her statutory declarations but also asked the applicant if there was anything she wanted to add in relation to matters under Regulation 2.41. The applicant referred to the recent TRA letter. The Tribunal asked the applicant if she had made any contribution to the community. She stated that she is not a member of any clubs or of a Nepalese association.”

These extracts seem to me indicative of a finding that the Tribunal did not really address criteria 2.41(f) in a manner that could be said to be engaging with it. Rather than addressing each sub-paragraph of the criteria individually with the applicant it sought to utilise the applicant’s responses to other questions and where there appeared to be no relevant response dealt with the matter in a one line manner found in the extracted paragraphs of the reasons.

21. ***Any other incidences [sic] of non-compliance by the visa holder known to the Minister***

[140] There is no evidence of other instances of non-compliance by the applicant or of breaches of the law.

The respondent argues that this is a statement of a matter of fact which does not require any further elucidation. But the Tribunal’s job is to consider whether the fact that there is no evidence of other instances of non-compliance should weigh upon its decision to cancel the visa. It is not for the court to criticise the Tribunal on the amount of weight it might apply, but the court should be satisfied that the Tribunal considered whether or not to apply it. The Tribunal’s conclusions in relation to the whole application are found at [149] [CB 266]:

“The Tribunal has decided that there was non-compliance by the applicant in the way described in the notice given under s.107 of the Act. Further, having regard to all the circumstances, the Tribunal is satisfied that the applicant’s Subclass 880 visa should be cancelled.”

That is all. There is not even a passing acknowledgment to the factors under Regulation 2.41. The respondent asks the court to find that the Tribunal did actively engage with all of those matters and conclude in respect of them that they did not outweigh the seriousness of the applicant’s breach of s.103. Whilst this is subtly different from “excusing the Tribunal from its statutory obligation to enquire” *Zhong* at [85] and [86] I am not satisfied that this is an inference that I can make from the face of the document.

22. ***The time that has elapsed since the non-compliance***

[141] The applicant applied to TRA for her skills to be assessed for migration on 1 May 2006 and applied for a Subclass 880 visa on 22 June 2006.

It would seem to me that the purpose of making this a matter that the Tribunal should take into account is because if, for instance, the non-compliance was minor and the time between the non-compliance and the review was lengthy, a decision maker might feel that the applicant’s

otherwise blameless continuation in the country under the terms of the visa would militate against its cancellation. There is nothing in the decision record that indicates that the Tribunal discussed this aspect of this matter with the applicant or, even without discussing it, gave some thought to the length of time between 2006 and 2009; and so again I could not be satisfied that there was sufficient engagement with the issue.

23. ***Any breaches of the law since the non-compliance and the seriousness of those breaches***

[142] The Tribunal is not aware of any further breaches of the law.

Once again one might expect the Tribunal to indicate whether this factor was considered by it to be positive, neutral or negative in the decision making process but nothing is said and the matter was not addressed directly with the applicant.

24. ***Any contributions made by the holder to the community***

[143] The applicant stated that she is not a member of any clubs or of a Nepalese association. She is working in retail at a chemist shop. The applicant provided a letter from TRA dated 10 February 2009 stating that her application for assessment of her skills as a Cook for the purposes of migration had been successful.

The applicant made much of the fact that the Tribunal did not consider that the applicant's payment of tax, whilst working, as [sic] a contribution to the community. This was a matter which loomed large in *Zhong* where the applicant made that suggestion to the Tribunal and the Tribunal responded:

"Against this evidence, the Tribunal has accepted that the review applicant has made some contribution to the community through the payment of tax and that he has been in Australia for a reasonably lengthy period."

The fact that the Tribunal may have overlooked a particular contribution that had not been put forward by the applicant can hardly lead to a finding of jurisdictional error. The court in *Zhong* found in the circumstances of that case that even though the Tribunal had noted that the applicant put this forward as a contribution it did not satisfy it that the Tribunal "specifically enquired into any contribution made by the holder to the community." I would not have taken that view in respect of the matters raised by this applicant if I could have seen how the Tribunal had treated them. But I cannot. The claims are merely set out without comment.

56 The foregoing analysis led the Federal Magistrate to conclude that the Tribunal had failed altogether to engage intellectually with the subject matter of any of subpars (f) to (k) of reg 2.41. At [25] of his reasons, the Federal Magistrate said:

25. I am of the opinion that the obligation to consider the matters in Reg. 2.41 should not just be noted. The Tribunal should at best clearly indicate how it has engaged with them and at the very least allow such an inference to be drawn from the whole of the content of the decision document. I regret that in an otherwise thorough examination of the applicant's situation, and in particular of the "bogus document" issue, the Tribunal failed to do this in respect of the four [sic] criteria 2.41(f) to (k) and thus fell into jurisdictional

error by not taking into account relevant considerations. I will grant the applicant the constitutional writs sought and order that the First Respondent pay her costs which I assess in the sum of \$5,800.00.

THE APPEAL IN THIS COURT

The Relevant Principles

57 Section 109(1)(c) of the Act obliges the Tribunal to “*have regard to*” the prescribed circumstances set out in reg 2.41. The consideration of those prescribed circumstances is thus a jurisdictional prerequisite to the exercise of the Ministerial discretion to cancel a visa under s 109. In order to comply with that prerequisite, the decision-maker must engage in what has been described as “*an active intellectual process*” in which each of the prescribed circumstances receives his or her “*genuine*” consideration: *Tickner* at 462 (per Black CJ) and *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [105] (p 540) (per Gleeson CJ and Gummow J).

58 In the absence of any statutory or contextual indication of the weight to be given to factors to which a decision-maker must have regard, it is generally for him or her to determine the appropriate weight to be given to them: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41 (per Mason J). The failure to give any weight to a factor to which a decision-maker is bound to have regard in circumstances where that factor is of great importance in the particular case may support an inference that the decision-maker did not have regard to that factor at all.

59 Similarly, a decision-maker does not take into account a consideration that he or she must take into account if he or she simply dismisses it as irrelevant. On the other hand, it does not follow that a decision-maker who genuinely considers a factor only to dismiss it as having no application or significance in the circumstances of the particular case will have committed an error. A decision-maker is entitled to be brief in his or her consideration of a matter which has little or no practical relevance to the circumstances of a particular case. A court would not necessarily infer from the failure of a decision-maker to expressly refer to such a matter in its reasons for decision that the matter had been overlooked. But if it is apparent that the particular matter has been given cursory consideration only so that it may simply be cast aside, despite its apparent relevance, then it may be inferred that the matter has not in fact been taken into account in arriving at the relevant decision: *Elias v Commissioner*

of *Taxation* (2002) 123 FCR 499 at [62] (p 512) (per Hely J). Whether that inference should be drawn will depend on the circumstances of the particular case.

60 In some cases it may be apparent that amongst the factors to which a decision-maker is bound to have regard, there is one factor (or perhaps more than one) which is critical or fundamental to the making of the decision in question. This was true of the particular matter referred to by Mason J in *The Queen v Toohey; Ex Parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 338. As his Honour's reasons in *The Queen v Hunt; Ex Parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329 show, the relevant statutory provisions may make clear that a particular factor is "*a fundamental matter for consideration*". But the converse is also true. The relevant statutory provisions may show that a particular matter to which a decision-maker must have regard is not fundamental to the decision-making process in the sense discussed by his Honour: see, for example, *Singh v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 152 at [57] (p 164) (per Sackville J).

61 We respectfully agree with Sackville J in *Singh* where his Honour pointed out that the expression "*have regard to*" is capable of different meanings depending on its context. As his Honour said at [54] (p 163):

.... a statutory obligation to have regard to specified matters when making an administrative decision may require the decision-maker to take the matters into account and "give weight to them as a fundamental element in making his [or her] determination": *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329 per Mason J. Indeed, this is the meaning that was given to the predecessor of s 501(6)(c) of the *Migration Act* (relating to the character test): *Minister for Immigration and Ethnic Affairs v Baker* (1997) 73 FCR 187 at 194. But the phrase "have regard to" can simply mean to give consideration to something (*Shorter Oxford English Dictionary*). In this sense a direction to a decision-maker to have regard to certain factors may require him or her merely to consider them, rather than treat them as fundamental elements in the decision-making process.

62 In our opinion, the prescribed circumstances to which the Minister must have regard in the present case are of the latter kind. There are 10 different criteria that are prescribed by reg 2.41 for the purposes of s 109(1)(c) of the Act. It is hard to see why a decision-maker should be required to treat each and every one of them as fundamental for the purposes of s 109. Although the Minister must have regard to each and every one of the prescribed circumstances, not all of them will be central or fundamental to every case in which the Minister is called upon to make a decision under s 109(1) of the Act.

63 In *Lafu v Minister for Immigration and Citizenship* (2009) 112 ALD 1, at [47]–[54] (pp 7–8), the Full Court held:

- (a) In circumstances where a decision-maker is required to have regard to several specified or prescribed mandatory considerations, he or she must genuinely have regard to each and every one of those considerations and must engage actively and intellectually with each and every one of those considerations by thinking about each of them and by determining how and to what extent (if at all) each of those criteria might feed into the deliberative process and the ultimate decision; and
- (b) The reasons for decision published by a decision-maker who is obliged to have regard to mandatory considerations should show such an active intellectual engagement with all mandatory criteria although such reasons are:

... meant to inform and [are] not to be scrutinised by over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed [see *Minister for Immigration and Ethnic Affairs v Liang* (1996) 185 CLR 259 at 272].

64 In *WAEF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 630, at [46] (p 641), the Full Court held that:

- (a) It is not necessary for an administrative decision-maker such as the Tribunal to refer in its written reasons to every piece of evidence and every contention made by an applicant;
- (b) It may be that some evidence is irrelevant to the criteria and some contentions misconceived; and
- (c) The reasons of a tribunal such as the Tribunal in the present case should not be scrutinised “*with an eye keenly attuned to error*” nor is it necessary to provide reasons of a kind that might be expected of a court of law.

65 At [47] of its reasons in *WAEF*, the Full Court said:

- 47. The inference that the tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected. Where however there is an issue raised by the evidence advanced on behalf of an

applicant and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the tribunal's review of the delegate's decision, a failure to deal with it in the published reasons may raise a strong inference that it has been overlooked.

66 *Zhong* is not authority for any contrary propositions. In *Zhong*, Lander J held that, in the circumstances of that case, s 107 of the Act had never been engaged. His Honour then held that, if he were wrong in his primary conclusion and if s 107 had been engaged so that the delegate had been entitled to give the notice which was given, the notice failed to comply with s 107 in that it did not particularise the alleged non-compliance. At [81] and [82] (p 460) of his reasons, his Honour said:

- 81 If I am wrong about s 107 never being engaged and the delegate was entitled to give the notice which was given, the notice in my opinion failed to comply with s 107 in that it did not particularise the possible non-compliance. Because particulars of the non-compliance were not given, it meant that the appellant could not give a written response to the notice disputing there was non-compliance and showing there was compliance as provided for in s 107(1)(b). The giving of a notice which complies with s 107 of the Act is a statutory precondition to the exercise of the Minister's or delegate's power to cancel the visa: cf *Tien v Minister for Immigration and Multicultural Affairs* (1998) 89 FCR 80; *Zhou v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 60.
- 82 In my opinion, for that second reason, the notice given did not comply with s 107. In my opinion, the decision to cancel the visa must be quashed.

67 Having decided the matter on the bases described at [66] above, Lander J went on to provide yet a further reason why the decision in that case could not stand. His Honour held, probably by way of obiter, that the Tribunal had not given specific consideration to the mandatory criterion specified in reg 2.41(k). Whilst it is true that, in considering this point, his Honour said, at [84]–[86] (p 460) of his reasons:

- 84 The federal magistrate found that one of the reasons for rejecting the appellant's arguments was that the positive factors were outweighed by the "extremely adverse findings that the Tribunal has made above regarding the provision of false and misleading evidence and fraudulent documentation".
- 85 It might be thought that the federal magistrate was thereby excusing the Tribunal from its statutory obligation to enquire into the question of the appellant's contribution to the community. Whilst the Tribunal was entitled to make the adverse findings that it made in relation to the appellant's conduct, that did not relieve it of its obligation to comply with the injunctions under s 109(1)(c) and reg 2.41(k) to specifically enquire into any contribution made by a holder to the community.

- 86 A reading of the Tribunal's reasons shows that it did not make that enquiry. It was not excused from doing so for the reason given by the federal magistrate. The Tribunal thereby failed to exercise its jurisdiction.

his Honour did not intend to suggest in these passages that the Tribunal had an obligation which was different from that which was mandated by s 109(1)(c). The use by his Honour of the expression "*specifically enquire into*" in respect of the relevant criterion was not intended to recast the decision-maker's statutory obligation. What the decision-maker is required to do is to "*have regard to*" the relevant criterion. In the present context, the expression "*have regard to*" imposes upon the Minister the obligation to engage with the criteria laid down in reg 2.41 in the manner described by us at [57]–[62] above.

- 68 There are ten criteria specified in reg 2.41. The list of factors set out in reg 2.41 is not an exhaustive statement of the factors that the Minister might properly consider to be relevant in any given case. That list contains all of the mandatory criteria and, therefore, constitutes a comprehensive statement of those considerations which must be taken into account. There is nothing in the language of reg 2.41, the terms of s 109 or the context in which reg 2.41 is to be applied which requires that the Minister should give any particular weight to any one factor or group of factors nor is there any indication in any of those materials that one or more factors are to be accorded primacy. The weight to be given to any one factor or group of factors is entirely a matter for the Minister and will vary from case to case. Further, in any given case, facts and matters which might properly be raised under one subparagraph of the regulation may also be quite properly raised under other subparagraphs of the regulation.

- 69 It is not essential for the Tribunal, when conducting a review of a delegate's decision to cancel a visa under s 109(1) of the Act, to compartmentalise its reasons and to set out those reasons by reference to each criterion specified in reg 2.41. That may be a convenient and appropriate method for the Tribunal to adopt in many cases but it is not the only way for the Tribunal to demonstrate that it has had regard to all of the mandatory criteria specified in reg 2.41.

- 70 Of course, as the Full Court said in *Lafu* at [50] (p 8), the Court is entitled to look closely at the structure of the Tribunal's reasons in order to assess whether it truly has had regard to all mandatory criteria. If, for example, the Tribunal chooses to list each of the reg 2.41 criteria and to make observations and findings in respect of each of those criteria in

turn as part of a discrete section of its reasons, the Court which undertakes judicial review of those reasons may be driven to conclude that all of the Tribunal's reasons concerning the reg 2.41 factors are contained in that section of the Tribunal's reasons. But that will not necessarily be so. Each case must be looked at and evaluated according to its own particular circumstances.

71 The question of whether or not a decision-maker has had regard to all mandatory criteria is a question of fact. That question will usually have to be determined by the Court undertaking a close analysis of the decision-maker's reasons without the benefit of other evidence, for example, from the decision-maker. As the Full Court said in *SZDXZ v Minister for Immigration and Citizenship* [2008] FCAFC 109 at [25]:

... However, the appellants are obliged to do more than point to material capable of supporting an inference that the Tribunal did not consider the Police letter. It is necessary for the appellants to demonstrate that, having regard to all of the evidence and other material before the Court, it would be appropriate to draw that inference; that is, the appellants must demonstrate, on the balance of probabilities, that the Tribunal did not consider the Police letter.

The Submissions of the Parties

72 Senior Counsel for the Minister submitted that:

- (a) In order to show that the Tribunal did not fulfil the statutory precondition laid down by s 109(1)(c) of the Act, an applicant for judicial review must establish on the balance of probabilities that the Tribunal failed to have regard to at least one of the criteria specified in reg 2.41 before arriving at a decision under s 109;
- (b) The weight to be given by the Tribunal to each of those criteria is a matter entirely within the jurisdiction and discretion of the Tribunal;
- (c) A failure on the part of the Tribunal to explain in its written reasons the weight which it accorded to each of the factors specified in reg 2.41 does not warrant the conclusion in every case that the Tribunal did not have regard to those factors. Such a failure may lead to that conclusion in a particular case but will not inevitably do so in every case;
- (d) The proposition in (c) above is supported by the following considerations:

- (i) The statutory scheme provides no express requirement as to the weight or emphasis to be accorded to any of the prescribed circumstances;
 - (ii) No guidance may be necessarily implied from that statutory scheme (as to which see the judgment of the Full Court in *Australian Crime Commission v NTD8* (2009) 177 FCR 263 at [56]);
 - (iii) There is a relatively large number of factors to be considered (10 in all); and
 - (iv) On the facts of any given case, some of the factors may have no or very little relevance or application to the proper exercise of the discretion. The significance to be accorded to any particular factor will inevitably be shaped and influenced by the materials and arguments put before the relevant decision-maker by the visa holder;
- (e) The Tribunal is not required to explain what weight it attaches to any one of the prescribed circumstances vis-à-vis the others (or any one or more of the others) in order to negate an inference that it has not had regard to a particular prescribed circumstance for the purposes of s 109(1)(c). The question of weight is left to be determined by the decision-maker;
- (f) In the present case, the Federal Magistrate drew an inference which was either incorrect or not open to him when he concluded that the Tribunal had failed to engage with each and every one of the contentious criteria. In support of this contention, it was submitted on behalf of the Minister that:
- (i) By addressing each of the relevant criteria under appropriate headings, the Tribunal had clearly sought to call its attention to all of the relevant matters;
 - (ii) The Tribunal had specifically invited Ms Khadgi to make submissions and provide information in relation to each of the prescribed circumstances referred to in reg 2.41 in its letter dated 1 April 2009. In response to that invitation, Ms Khadgi had either said nothing at all or nothing relevant or very little, depending upon which particular factor was under consideration;
 - (iii) The Tribunal had specifically alluded to the prescribed circumstances in its written reasons and had referred to material relevant to those circumstances throughout its written reasons (see [11], [14], [36], [49] and [87] of its reasons);

- (iv) The Tribunal had raised reg 2.41 and the factors required to be considered by the Tribunal directly with Ms Khadgi and her representative at the oral hearing; and
- (v) The Tribunal expressed itself relevantly in the language of the statute at [149] of its reasons when it said that it had had regard to all of the circumstances. The obvious inference to be drawn in the present case is that the Tribunal's assessment of each of the contentious criteria did not provide a basis for offsetting or weakening its assessment of the matters referred to in subpars (a) to (e) of reg 2.41. These matters were considered by the Tribunal to be significant and adverse to Ms Khadgi; and
- (g) The Federal Magistrate erred in drawing the inference which he did and in concluding that none of the contentious criteria had been considered as required by s 109(1)(c). His Honour said that the Tribunal had not fully engaged or sufficiently engaged with any of the contentious criteria. The Federal Magistrate erred when he applied a test which required either of those levels of engagement.

73 Senior Counsel for the Minister sought to confine and distinguish *Lafu*, *Tickner* and *Zhong*. In our view, it is unnecessary to attempt to narrow the import of what was said in those cases. Each provides an illustration of how the relevant principles might be applied to particular facts.

74 Counsel for Ms Khadgi submitted that:

- (a) The essence of the Federal Magistrate's decision was a finding of fact, drawn by way of inference, that the Tribunal did not "*consider*" any of the contentious criteria. As a finding of fact, that finding should not be disturbed on appeal unless it is considered not to have been open to the Federal Magistrate;
- (b) The Federal Magistrate correctly identified and applied the relevant principles;
- (c) The Tribunal failed to have regard to any of the contentious criteria and thereby committed jurisdictional error. In respect of the contentious criteria, the Tribunal did no more than recite the state of the evidence before it in respect of those criteria. The Tribunal did not actively and intellectually engage in a consideration of any of those criteria. The Tribunal's reasons did not reveal whether each particular factor was

taken into account and, if so, how and to what extent each factor was taken into account. There should have been a specific inquiry by the Tribunal into each of the contentious criteria (*Zhong* at [83]–[87] (p 460)). This approach to the contentious criteria contrasted with the approach taken by the Tribunal to the factors referred to in subpars (a) to (e) of reg 2.41. In respect of those factors, the Tribunal undertook an appropriate level of intellectual engagement.

Consideration

75 In the present case, we must decide whether the Federal Magistrate was correct when he concluded, as he did, that the Tribunal had simply failed to have regard to any of the contentious criteria. It was common ground that the Federal Magistrate had arrived at this conclusion by a process of inference having regard to the structure and terms of the Tribunal’s reasons.

76 For reasons which we will explain, we think that the Federal Magistrate erred in making that finding and that the appeal should therefore be allowed.

Some General Observations

77 This Court is as well placed as the Federal Magistrates Court to determine whether the Tribunal had regard to all mandatory criteria as required by s 109(1)(c) of the Act when it affirmed the delegate’s decision. We therefore reject Ms Khadgi’s submission to the effect that the Federal Magistrate’s findings have a status equivalent to findings of fact which are to a significant extent dependent upon the trial judge’s assessment of witnesses.

78 Second, with great respect to the Federal Magistrate, we think that he applied an overly-stringent approach to his determination of the question before him. The task with which he was confronted was to decide whether the Tribunal had had regard to each of the criteria specified in reg 2.41(f) to (k) in the sense in which we have explained the expression “*have regard to*” at [57]–[62] above. The Tribunal was not obliged to specify the weight which it accorded to each factor nor was it obliged to explain in any detail at all why it was that it had accorded that weight to that factor. The Federal Magistrate said that the Court needed to be able:

(a) “*to identify an appropriate level of engagement*”;

- (b) *“to assess the quality of the Tribunal’s discussion”* of the mandatory criteria from the Tribunal’s reasons;
- (c) *“to decide (for itself) whether the manner in which the Tribunal dealt with the particular criteria came up to the required standard”*; and
- (d) *“to discern that the Tribunal had been sufficiently engaged (or fully engaged) with the particular criterion”*.

79 The expressions to which we have referred at [78] above suggest that the Federal Magistrate was of the opinion that the Court must be able to conclude from the material before it not only that each of the mandatory criteria laid down in reg 2.41 was, in fact, taken into account but must also be able to discern the manner in which each criterion was taken into account and the reasons why it was considered in that manner. Although his Honour accepted that the question of weight was a matter which was exclusively within the jurisdiction and discretion of the Tribunal, he nonetheless took the view that, unless the reasoning process of the Tribunal was fully exposed, even in respect of matters of weight, the Court could not, at least in the present case, be satisfied that the mandatory criteria specified in reg 2.41 had all been taken into account. We think that this approach does not correctly apply the law and was erroneous.

80 Third, in several places in his reasons, the Federal Magistrate suggested that the Tribunal had failed to draw to the attention of Ms Khadgi and her representative the fact that the Tribunal was obliged to have regard to the mandatory criteria specified in reg 2.41 and did not convey the terms of reg 2.41 to Ms Khadgi or her representative. He also said that the Tribunal did not take Ms Khadgi through reg 2.41 at the Tribunal hearing nor did the Tribunal record any response which she may have made.

81 We do not agree with these remarks. Relevantly:

- (a) At all relevant times, Ms Khadgi was represented by a migration agent who assisted her with her response to the s 107 letter and her response to the 1 April 2009 letter from the Tribunal. At all times, she was advised and represented by a migration agent in relation to her visa application and the Department’s investigations;
- (b) In the s 107 letter, the delegate accurately and adequately explained the process that was then in play. In that letter, the delegate specifically referred to reg 2.41 and set

out its terms in full. All relevant sections of the Act (including s 105) were extracted in full and provided to Ms Khadgi;

- (c) Ms Khadgi was invited to provide a written response to the s 107 letter. She was expressly invited to address the reg 2.41 criteria;
- (d) Ms Khadgi's response to the s 107 letter is relevantly extracted at [21] above. She addressed only some of the reg 2.41 criteria and did so in terms which were not always relevant;
- (e) In its letter dated 1 April 2009, the Tribunal also specifically drew Ms Khadgi's attention to the review process and invited her to address the requirements of reg 2.41. Her only answer was to persist in her contention that the contents of her work experience documentation dated 18 April 2006 were true and to refer to her ongoing employment in Australia;
- (f) At the Tribunal hearing, Ms Khadgi produced to the Tribunal the second TRA approval. The Tribunal noted it without criticism. It seems to have been accepted by the Tribunal as a valid approval. Ms Khadgi's employment history and hopes for the future were also mentioned; and
- (g) Ultimately, after referring to its obligation to have regard to the criteria specified in reg 2.41 (at [87] of its reasons), the Tribunal asked some specific questions directed to those criteria. Those questions and Ms Khadgi's answers to them are recorded at [88]–[89] of the Tribunal's reasons.

82 The facts summarised at [81] above make clear that Ms Khadgi was alerted on three separate occasions to the existence of reg 2.41 and to its significance in the review process. She chose to address the criteria specified in reg 2.41 in a limited way. That approach reflected deliberate decisions made by her, presumably on advice.

83 In our view, it is incumbent on the visa holder who is engaged in the visa cancellation process envisaged by s 109 to articulate facts, matters and circumstances to which he or she suggests the Minister should have regard as required by reg 2.41. The reg 2.41 criteria direct the Minister's attention to particular factors at a general level but it is for the visa holder to shape and mould the Minister's consideration of those criteria by reference to his or her individual circumstances. Whilst the Minister must, of course, have regard to material, information and documentation in his possession which properly fall within the purview of

the reg 2.41 criteria, irrespective of their source, it will largely fall to the visa holder to flesh out that material in order to enable the Minister's discretion to be properly exercised. For example, consider the criteria in reg 2.41(a), (e), (f) and (k). If the visa holder does not address those criteria with evidentiary material and submissions, it is not likely that there will be much material (if any) before the Minister for him or her to consider and evaluate. In that event, it is not likely that there will be much for him or her to say about those criteria.

84 In the present case, the Court must be mindful of the facts as summarised at [81] above when reviewing and analysing the Tribunal's reasons for the purpose of determining whether the Tribunal had regard to all of the criteria specified in reg 2.41. Ms Khadgi had every opportunity to put evidentiary material and submissions before the Tribunal and did so, albeit in only a limited way. The extent to which the Tribunal was compelled to engage with the criteria specified in reg 2.41 was inevitably heavily influenced by the terms of Ms Khadgi's responses to the invitations extended to her by both the delegate and the Tribunal to address those criteria.

85 We propose to consider each of the contentious criteria in turn but to do so with the general observations in mind which we have made at [77]–[84] above.

Regulation 2.41(f)—The subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act

86 Subdivision C of Div 3 of Pt 2 of the Act comprises ss 97–115 of the Act.

87 The expression “*subsequent behaviour*” means behaviour which took place after the non-compliance. In the present case, the non-compliance was the provision of the first TRA approval to the Department on 21 June 2006. The relevant period in respect of which Ms Khadgi's behaviour needed to be considered by the Tribunal was the period from 21 June 2006 to 4 December 2009 (the date of the Tribunal's decision).

88 It was not Ms Khadgi's subsequent behaviour generally that was required to be considered. It was her subsequent behaviour “... *concerning her obligations under Subdivision C ...*” (viz under ss 97–115 of the Act).

89 The word “*concerning*” is a word which denotes a link with the subject matter which it qualifies: In this case, Ms Khadgi’s obligations under ss 97–115 of the Act. That link should be real. A careful consideration of ss 97–115 of the Act demonstrates that the only obligations imposed upon Ms Khadgi under those sections which could conceivably be engaged under reg 2.41(f) were Ms Khadgi’s obligations under s 104 (obligation to notify any change in circumstances which renders incorrect answers and information given on a visa application form) and s 105 (general obligation to correct incorrect answers on a visa application form). Section 104 was not apt. However, throughout the relevant period, Ms Khadgi had an obligation under s 105 of the Act to correct the incorrect information which was contained in her work experience documentation dated 18 April 2006 which had been used by her to procure the first TRA approval. That obligation was enlivened on 21 June 2006 when she submitted the first TRA approval to the Department and remained in existence until 4 December 2009.

90 Therefore, the subsequent behaviour which was relevant for the purposes of the Tribunal’s consideration of reg 2.41(f) was Ms Khadgi’s consistent and persistent assertion throughout the relevant period that the contents of the 18 April 2006 work experience documentation were accurate—that she had worked as often and for the hours which she claimed at Da Franco Incontro Restaurant in the period from 9 April 2005 to 27 March 2006. This assertion by Ms Khadgi was maintained in the face of investigations by the Department and in the face of the Tribunal’s review of the delegate’s decision. It was maintained notwithstanding that Mr Graniero had recanted and denied the essential elements of Ms Khadgi’s version of events. This stance on the part of Ms Khadgi meant that she did not correct this false information as she was bound to do under s 105 of the Act.

91 It is true that, at [139] of its reasons, the Tribunal did not refer at that point to the matters which we have noted at [90] above. However, in earlier paragraphs of its reasons, the Tribunal undertook an extensive analysis of the facts concerning the procuring of the first TRA approval and its subsequent use. In particular, the Tribunal referred to Ms Khadgi’s response to the s 107 letter (at [31]–[44] of its reasons and again at [112]–[114] of its reasons). The Tribunal also referred to Ms Khadgi’s response to its letter of 1 April 2009 and to questions put to her and to her representative during the Tribunal hearing (at [88]–[89] of its reasons).

92 Ultimately, the Tribunal did not accept Ms Khadgi's account of her work experience and therefore held that the contents of the 18 April 2006 work experience documents were not true. Of necessity, that finding meant that Ms Khadgi had an obligation under s 105 of the Act to correct the false information which underpinned the first TRA approval. She failed to do so.

93 Whilst the Tribunal did not advert to Ms Khadgi's obligation under s 105 of the Act to correct false information in the section where it addressed reg 2.41(f), nonetheless it clearly addressed the substance of the matter in great detail elsewhere in its reasons.

94 What, then, is Ms Khadgi's complaint in respect of reg 2.41(f)? Counsel for Ms Khadgi accepted that the thrust of her case at all times before the delegate and before the Tribunal was that the contents of her work experience documentation of 18 April 2006 were true. In the appeal, Counsel argued that, in the submission to the delegate made by Ms Khadgi's migration agent on 9 October 2008, Ms Khadgi had raised two specific matters as being relevant to the delegate's (and thus, ultimately, the Tribunal's) consideration of the criterion mandated by reg 2.41(f). These were:

- (a) The fact that Ms Khadgi had responded promptly to the s 107 letter; and
- (b) The assertion that Mr Graniero had changed his story because she had rejected his sexual advances.

95 Counsel also pointed to the fact that Ms Khadgi had managed to obtain the second TRA approval.

96 The fact that Ms Khadgi responded promptly to the s 107 letter (if she, in fact, did) is neither here nor there. A prompt but untruthful response was of no assistance to Ms Khadgi. The other two matters are not capable of relevantly informing the Tribunal's consideration of the criterion specified in reg 2.41(f).

97 The only matter requiring the Tribunal's attention for the purposes of reg 2.41(f) in the present case was whether or not Ms Khadgi had corrected the false information which she had used to procure the first TRA approval as she was obliged to do by s 105 of the Act. The undisputed fact is that she never did so.

98 The fact that she failed to meet her obligations under s 105 was the inevitable corollary of the Tribunal's conclusion that the contents of her 18 April 2006 work experience documentation were false. That conclusion was a reasoned one which was open to the Tribunal.

99 The statement made by the Tribunal at [139] of its reasons needs to be understood in light of its analysis and findings which preceded that paragraph. All that is really being said is: There is no information about Ms Khadgi's subsequent behaviour which needs to be taken into account in addition to the facts and matters traversed in detail earlier in the Tribunal's reasons concerning her work experience documentation dated 18 April 2006 and the use which was made of that documentation. Notwithstanding the structure of the Tribunal's reasons, we think that those reasons, when fairly read, reveal that the Tribunal applied its mind to the relevant subsequent behaviour of Ms Khadgi.

100 Ms Khadgi could not point to any information or submission which was relevant to the criterion referred to in reg 2.41(f) and which was before the Tribunal to which the Tribunal did not have regard.

101 The Federal Magistrate dealt with this criterion at [20] of his reasons. He observed that Ms Khadgi co-operated with the Department and "*went further*" by obtaining the second TRA approval. Although he referred to [87] and [89] of the Tribunal's reasons, the Federal Magistrate held that there was nothing in the Tribunal's record that indicated that it "*took Ms Khadgi through these criteria*" at the hearing and recorded her response.

102 His Honour then concluded that the Tribunal had not appropriately addressed reg 2.41(f).

103 We think that the Federal Magistrate erred when he concluded that there was no or no sufficient engagement by the Tribunal with the criterion specified in reg 2.41(f).

104 The Tribunal applied its mind in detail to Ms Khadgi's assertion that the contents of her 18 April 2006 work experience documentation were true. It found against her. The only matters which she ever offered by way of evidence or submission in addition to that core assertion were irrelevant to the proper consideration of the reg 2.41(f) criterion. She did not

make any submission or put any material whatsoever before the Tribunal relevant to reg 2.41(f) in answer to its letter dated 1 April 2009 or in answer to its general question about reg 2.41 recorded at [89] of the Tribunal's reasons. The matters mentioned by the Federal Magistrate at [20] of his Reasons were not relevant to the Tribunal's consideration of reg 2.41(f).

Regulation 2.41(g)—Any other instances of non-compliance by the visa holder known to the Minister

105 This sub-regulation requires the decision-maker to bring to mind and evaluate all other instances of non-compliance known to him or her. In the present case, there were no other instances of non-compliance known to the Tribunal.

106 The Tribunal made and recorded a finding to this effect. That was all that it was required to do.

107 Regulation 2.41(g) requires that the decision-maker have regard to such instances if, and only if, such instances exist and are known to the decision-maker. The fact that none exist is not a relevant factor. The regulation is not expressed as "*whether or not there are*" other instances of non-compliance known to the Minister. It must be remembered that the decision-making process that may be engaged by the Minister under s 109(1) of the Act is directed to the making of a decision to cancel the visa held by the visa holder. Subject to s 109(2), the Minister is not obliged to commence that process even if there has been relevant non-compliance by the visa holder and even if a valid s 107 notice has been issued. The Minister retains a discretion as to whether he will engage s 109(1) at all. It is only when he has decided to do so that he must comply with s 109(1).

108 At [21] of his reasons, the Federal Magistrate said that the Court needed to be satisfied that "*the Tribunal considered whether or not to apply it*" and that he was not so satisfied in this case. We do not understand this observation. It seems to us that the Federal Magistrate held that the fact that there were no other instances of non-compliance by Ms Khadgi should have been taken into account by the Tribunal and should have been weighed in the balance favourably to her. Although his Honour stated that the amount of weight to be accorded to this circumstance was a matter for the Tribunal, his Honour appears

nonetheless to have held that the Tribunal had failed to have regard to the criterion specified in reg 2.41(g) because:

- (a) It was not clear from its reasons whether it had regard at all to the fact that there were no other instances of non-compliance known to the Tribunal; and
- (b) If it did have regard to that fact, it was not clear how it did so.

109 The Federal Magistrate erred by making these findings. The Tribunal did everything that it was required to do by reg 2.41(g). In any event, even though it was not required to take into account the fact that there was no suggestion of any other instances of non-compliance on the part of Ms Khadgi, we think that the Tribunal did take that matter into account in Ms Khadgi's favour because, at [149] of its reasons, the Tribunal picked up the observation made at [140] of those reasons.

Regulation 2.41(h)—The time that has elapsed since the non-compliance

110 In order properly to consider this factor, the Tribunal must bring to mind the time which has elapsed since the non-compliance. It did so and did so accurately.

111 Ms Khadgi did not address any specific submission to the Minister or to the Tribunal as to the significance of the time that had elapsed since the non-compliance. She did submit that she was currently employed in Australia and would find it difficult to obtain suitable work if she had to return to Nepal. She claimed that the cancellation of her visa would cause her family hardship and cost. These matters were addressed by the Tribunal at [137]–[138] of its reasons.

112 At [22] of his reasons, the Federal Magistrate held that the Tribunal had failed to engage sufficiently with the criterion specified in reg 2.41(h). He appears to have come to this conclusion because, in his view, there was nothing in the Tribunal's reasons that demonstrated that the matter had been raised with Ms Khadgi and nothing to indicate that the Tribunal gave any thought to the significance of the period of time which it noted at [141] of its reasons.

113 However, in its letter of 1 April 2009, the Tribunal asked Ms Khadgi to address all of the criteria laid down in reg 2.41. At the Tribunal hearing, it also specifically drew her

attention to reg 2.41 and asked her if she had anything to say about the criteria specified in reg 2.41 (as to which, see [87] and [89] of the Tribunal's reasons). In response to these requests, she said nothing that could be said to relate to the criterion specified in reg 2.41(h). Ms Khadgi had adopted a similar position in response to the s 107 letter sent by the delegate.

114 The Federal Magistrate erred in finding that the Tribunal had not sufficiently engaged with the criterion specified in reg 2.41(h). The simple fact was that Ms Khadgi did not specifically address this criterion. The Tribunal turned its mind to the matters referred to at [111] above. It was not required to do more.

Regulation 2.41(j)—Any breaches of the law since the non-compliance and the seriousness of the breaches

115 We think that this criterion should be approached in the same way as the criterion specified in reg 2.41(g).

116 Furthermore, we think that, whether or not the Tribunal was obliged to take into account in Ms Khadgi's favour the fact that she had not committed other breaches of the law, the Tribunal did take that fact into account (see [149] of its reasons).

117 For reasons similar to those given in respect of reg 2.41(g), we think that the Federal Magistrate also erred when he made the finding which he did at [23] of his reasons. Regulation 2.41(j) was raised with Ms Khadgi in the s 107 letter, in the 1 April 2009 letter from the Tribunal and again at the Tribunal hearing. The Federal Magistrate required the Tribunal to explain the weight which it accorded to this factor. This was wrong in principle as the weight to be accorded to any particular factor is quintessentially a matter for the Tribunal.

Regulation 2.41(k)—Any contribution made by the holder to the community

118 In most cases, it will be the visa holder who will be best placed to specify the contribution made by him or her to the community for the purposes of reg 2.4(k).

119 In the present case, this factor was raised with Ms Khadgi in the s 107 letter and by the Tribunal in its letter dated 1 April 2009. In addition, at the Tribunal hearing, a specific question was addressed by the Tribunal to Ms Khadgi in relation to this factor.

120 In answer to the question asked about reg 2.41(k) at the Tribunal hearing, Ms Khadgi said that she was not a member of any clubs or of a Nepalese association. She did not point to any other contribution that could conceivably have been relied upon by her. She did, however, suggest that she intended or hoped to make a significant contribution in Australia through her future employment in the hospitality industry. This response addressed the future whereas reg 2.41(k) required evidence going to the past and to the present.

121 At [143] of its reasons, the Tribunal noted that Ms Khadgi had stated that she was not a member of any clubs or other Nepalese association, that she was currently working in retail at a chemist shop and that she had reapplied for a skills assessment and obtained the second TRA approval.

122 None of these matters was relevant to the reg 2.41(k) criterion.

123 The Federal Magistrate, at [24]–[25] of his reasons, held that the Tribunal had failed in its obligation to have regard to the criterion specified in reg 2.41(k) because he could not discern from the Tribunal’s reasons how the Tribunal had treated the matters raised by Ms Khadgi. Again, we think that the Federal Magistrate overstated what was required of the Tribunal and impermissibly imposed upon it an obligation to explain the weight which it accorded to this factor.

124 Ms Khadgi had not pointed to any contribution made by her to the community which could properly be taken into account. There is no suggestion that the Tribunal ignored some other relevant contribution of which it was aware. The Tribunal turned its mind to this criterion and asked a question about it. It recorded Ms Khadgi’s answer to that question. That answer made clear that there was no contribution which was required to be taken into account. That was all the Tribunal was required to do.

125 The Federal Magistrate also mentioned that Ms Khadgi had made much of the fact that the Tribunal did not regard the circumstance that she had paid tax in Australia as a contribution to the community. It is not clear to us what (if anything) the Federal Magistrate made of this fact. However, there was no evidence before the Tribunal that Ms Khadgi had ever paid tax in Australia. She had been invited by the Tribunal to produce evidence that she had paid tax but she never produced any such evidence. In particular, she asserted that the

work which she had done at Da Franco Incontro Restaurant had been “*voluntary*” and that no taxable income had been earned during the time that she worked there. The failure on the part of the Tribunal to mention the question of tax does not matter.

Other Matters

126 At [132]–[138] of its reasons, the Tribunal dealt with the factors specified in reg 2.41(a) to (e). In those paragraphs, the Tribunal concluded that Ms Khadgi had propounded false documents and had done so in order to procure an approval from TRA to which she was not entitled. That approval had then been used to obtain her Subclass 880 visa which was subsequently cancelled by the delegate. The Tribunal considered this conduct on the part of Ms Khadgi to be “*a significant and serious matter*”. The conclusions which the Tribunal reached and explained at [132]–[138] of its reasons were clearly open to it and the Tribunal’s characterisation of the conduct of Ms Khadgi was also clearly open to it.

127 When the Tribunal’s reasons are considered in their entirety and, in particular, when the matters of discretion adumbrated at [129]–[149] of the Tribunal’s reasons are taken into account, it is clear that the Tribunal did not think that any of the matters specified in reg 2.41(f) to (k) (whether looked at individually or in combination with others) was sufficient to displace the impact of the dishonest conduct on the part of Ms Khadgi which had enabled her to procure her Subclass 880 visa.

CONCLUSIONS

128 For the reasons which we have explained, the appeal must be allowed and the orders made by the Federal Magistrate on 8 June 2010 set aside. Costs should follow the event.

I certify that the preceding one hundred and twenty-eight (128) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Stone, Foster and Nicholas.

Associate:

Dated: 3 December 2010